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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 57

CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHON ORGANIZATIONS, etc.,

Petitioner,

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., *et al.*, etc.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .

CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHONE ORGANIZATIONS, ETC., PETITIONER

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR. *et al.*, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Charles H. Parsons, Individually and as President of the United Telephone Organizations, *etc.*, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on February 20, 1950, reversing an order of the United States District Court of the District of Columbia and instructing that Court to dismiss the cause for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action.

Opinion Below.

The opinion of the Court of Appeals has not yet been officially reported. It appears at page 23 of the Transcript of Record.

The opinion of the United States District Court for the District of Columbia has not been officially reported. It appears at page 16 of the Transcript of Record.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254 (1).

Question Presented.

Whether the mandatory language of Section 10(k) of the National Labor Relations Act compels the National Labor Relations Board to accord petitioner a hearing and to determine the dispute giving rise to an unfair labor practice charge within the meaning of Section 8(b)(4)(D) of that Act, or whether the Board may, as a result of its own preliminary *ex parte* investigation, refuse to hear and determine such dispute.

Statutes Involved.

Section 10(k) of the National Labor Relations Act (the construction of which is the crux of this petition) provides as follows:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance

by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

The other relevant provisions of the National Labor Relations Act, including Section 8(b)(4)(D), are set forth in the Appendix to petitioner's brief.

The pertinent provisions of the Administrative Procedure Act are also set forth in the Appendix to petitioner's brief.

Statement.

On or about September 2, 1947, the United Telephone Organizations, (hereinafter referred to as "UTO") by petitioner, its president, filed an unfair labor practice charge with the Regional Director of the National Labor Relations Board for the Second Region. This charge recited that it was filed "pursuant to Section 10(k)" of the Act. It alleged that Local 3 of the International Brotherhood of Electrical Workers, A. F. L., was engaging in unfair labor practices within the meaning of Section 8(b)(4)(D) of the Act. This subsection of the Act describes conduct commonly referred to as the "jurisdictional dispute." In essence, the charge specified that Local 3 and its members concertedly refused, in the course of their employment, to work on any materials or perform any services in connection with conduit and telephone installations at Idlewild Airport in New York City, with the object of forcing the New York Telephone Company to assign particular work to employees who are members of Local 3 rather than to the employees of the Company who were members of UTO. The charge further specified that Local 3 threatened to have all American Federation of Labor building trades unions withdraw all their members from building construction work if con-

duit or telephone installations were erected by UTO (R. 2-3, 8-9).

On or about September 18, 1947, UTO filed a second charge with the same Regional Director. This charge alleged identical conduct by Local 3 in connection with telephone installation involved in the construction of various huge housing projects in the City of New York (R. 3-4, 10-11).

No hearings were held at any time in connection with either charge (R. 4-6).

However, almost a year after the filing of the charges, the Regional Director, on August 18, 1948, informed UTO that he was "refusing to issue complaint" in either matter (although Section 10(k) specifically calls, not for the issuance of complaints, but rather for the holding of a hearing and the making of a determination where charges of this sort have been filed) (R. 4, 5, 12). The Regional Director said he took his action "as a result of the investigation" after the charges had "been carefully investigated and considered" (R. 12).

UTO appealed the Regional Director's ruling to the General Counsel of the Board, who upheld the Regional Director. The General Counsel said that "like the Regional Director, the General Counsel concludes that there is insufficient evidence to warrant further proceedings" (R. 13). There was no hearing before the General Counsel.

UTO, thereupon, appealed to the Board. The Board held no hearings. It denied the appeal for the following reasons:

> "1. The Board is without authority to review actions of the General Counsel in refusing to issue complaints.
>
> 2. The Board is of the opinion that a hearing under the provisions of Section 10(k) of the Act is not mandatory and that the Regional Director upon

completion of investigation properly refused to issue a notice of hearing" (R. 14).

UTO, by petitioner, then brought suit against the Board and General Counsel in the District Court of the District of Columbia, predicating jurisdiction of that Court upon its general equity jurisdiction (Section 24(8) of the Judicial Code, 28 U. S. C. Section 1337) and upon Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A., Sections 1001 *et seq.*). UTO prayed that Court for a mandatory injunction ordering the Board to "hear and determine" the jurisdictional disputes in accordance with Section 10(k) (R. 6-7).

The Board moved to dismiss the Complaint on the grounds that: (a) the District Court was without jurisdiction of the subject matter of the action; and (b) the complaint failed to state a claim upon which equitable relief could be granted (R. 15).

The District Court, after hearing oral argument, entered an order denying the Board's motion (R. 16). The Court rendered an oral opinion supporting its order (R. 16-18). This opinion construed Section 10(k) to be mandatory and "to require the National Labor Relations Board to afford a hearing to persons making charges of this kind" (R. 18).

The Board, thereupon, elected not to plead further in this case, requesting the District Court, upon entry of its final order, to stay execution of same pending appeal (R. 18).

The District Court, on July 14, 1949, entered its order, directing the Board to hear and determine the jurisdictional disputes described in the charges filed by UTO. This order also stayed execution of same pending appeal by the Board (R. 19-20).

Upon appeal to the United States Court of Appeals for the District of Columbia Circuit, that Court unanimously

reversed the decision of the District Court. The Court instructed the District Court to "dismiss the cause for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action" (R. 33).

The opinion of the Court of Appeals (R. 23-32), after stating that the "principal problem involves a construction of Section 10(k)", went on to say that the answer to whether the District Court lacked jurisdiction over the subject matter and the answer to whether the complaint stated a cause of action depended entirely upon the construction to be placed upon Section 10(k).

The Court of Appeals construed Section 10(k) as being mandatory (R. 25), but further construed its mandate to the Board to "hear and determine" the disputes as not becoming effective if the investigation of the Board's agents revealed that the disputes alleged in the charges do not constitute an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act (R. 25-26). The Court said that the Board has the "right to conduct investigations in 10(k) proceedings", and if such investigation makes out a *prima facie* violation of Section 8(b)(4)(D), then the mandate to the Board to "hear and determine" the underlying dispute becomes operative, "though not until then" (R. 30).

Reasons for Granting the Writ.

Whether the Board failed to heed the mandate of Section 10(k) of the Act by refusing, as a result of its own preliminary *ex parte* investigation, to "hear and determine" the jurisdictional dispute giving rise to petitioner's 8(b)(4)(D) unfair labor practice charge, presents a substantial, important and novel issue and should be reviewed by this Court.

The issue is novel because it is the first time this Court has been presented with the construction of this important

and far-reaching amendment to the National Labor Relations Act (i.e., Section 10(k)). Only once before, in *Inland Empire District Council, Lumber and Sawmill Workers Union, et al* v. *Millis, et al*, 325 U. S. 697 (1945), was this Court faced with the issue of the Board's duty to accord a hearing. In that case, petitioner therein complained of not having been afforded an "appropriate hearing" under Section 9(c) of the Act, because the Board conducted an election and certified a union as the collective bargaining representative of employees in a given bargaining unit without holding a "hearing" until *after* the certification. The Board, then, issued a supplemental decision, after its hearing, based upon the entire record. This Court, through the late Mr. Justice Rutledge, concluded that the hearing required by Section 9(c) was mandatory, but that the Board had complied with such mandate by holding a hearing before making an "effective determination" (325 U. S. 697, 708).

But, in the instant case, which involves the duty of the Board to hold a hearing under Section 10(k) of the Act, no hearing of any kind was held at any time.

The issue, in addition to being novel, is substantial. It involves the manner in which the Board shall deal with jurisdictional disputes. The issue does not involve "pernicious abstractions."[1]

In addition to being novel and substantial, the issue is important. Petitioner's complaint is that he is entitled to

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[1] The jurisdictional dispute is traditionally a source of bitter industrial strife. This strife has been especially marked between telephone workers and electrical workers. The War Labor Board was faced with many such disputes in the telephone field and did not fail to resolve them (11 WLB 625; 13 WLB 418; 14 WLB 569; 1 WLB 259). UTO and Local 3, IBEW (involved in the case at bar) have engaged in at least 9 jurisdictional disputes since 1938, some of which were in connection with huge projects like the World's Fair, Idlewild Airport, Airlines Terminal Building and the various housing projects. During the first 20 months of the Amended NLRA, there were 117 jurisdictional dispute charges filed with the Board and only 4 were accorded a hearing by the Board.

a hearing and determination under Section 10(k) and that the Board has refused to conduct such hearing and to render such determination. This Court has rarely denied review of the refusal of an administrative agency to afford a full and fair hearing before taking action (either positive or negative), especially where, as here, the Statute, which has created the agency and has endowed it with whatever powers it possesses, specifically "directs" that agency to "hear and determine" a particular type of dispute. Since the crux of the issue in the case at bar is whether Section 10(k) does or does not require the Board to hold a hearing and render a determination in a case of this sort, the issue basically involves a principle of law. This Court has power to pass judgment on such issue. In this respect, the statement of this Court in *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 160 (1939), is pertinent:

> "The Court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission."

The complaint of a petitioner that he has been refused the full and fair hearing which an administrative agency is, by statute, to accord him has been rarely denied review by this Court. *Inland Empire District Council etc.* v. *Millis et al., supra,* saw this Court reviewing the alleged failure of the National Labor Relations Board to hold the hearing required by Section 9(c) of the Act. In *Kansas City Southern R. R. Co.* v. *Interstate Commerce Commission,* 252 U. S. 178 (1920), it was the I. C. C.'s alleged failure to conduct a full and fair hearing under Act of Mar. 1, 1913, C. 92, 37 Stat. 701 that came under the scrutiny of this Court. In *Morgan* v. *U. S.,* 298 U. S. 468 (1936), the alleged failure of the Secretary of Agriculture to accord petitioner therein

the full and fair hearing required by the Packers and Stockyards Act (42 Stat. 159, 7 U. S. C. 181-199) was reviewed by this Court. The complaint of petitioner, in *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294 (1932), that he had not been "heard" by the United States Tariff Commission in accordance with the provisions of the Tariff Act of 1922 (42 Stat. 858, 941) was, similarly, reviewed by this Court.

The above authorities make it apparent that, no matter what federal administrative agency happens to be involved, the question whether that agency has afforded the hearing and determination required by the statute which controls that agency's functions, is a matter of such importance as to obtain this Court's review.[2]

In the case at bar, it was conceded by the Board and the Court of Appeals that Section 10(k) of the Act is mandatory (R. 25, 30). However, the Court of Appeals construed that mandate as being inoperative until the Board, *after* its own *ex parte* investigation, has determined that there is a *prima facie* case establishing the existence of an 8(b)(4)(D) unfair labor practice (R. 26, 30).

This construction of Section 10(k) completely emasculates its mandatory effect. For, in any case where the Board (or its agents) decides against the feasibility of holding a hearing and making a determination under Section 10(k), it can avoid doing so by merely announcing that it finds no *prima facie* case establishing the existence of an 8(b)(4)(D) unfair labor practice. The Board, in its brief before the Court of Appeals (p. 23) stated that 117 charges

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[2] Indeed, in such cases as *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345 (1917); *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 293 (1937); *Railroad Commission* v. *Pacific Gas & Elec. Co.*, 302 U. S. 388 (1938), and *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177 (1938), the issue of "full and fair hearing" has been recognized as involving the due process clause of the Constitution.

of 8(b)(4)(D) violations were filed with it in the first 20 months of the amended Act and that only 4 of such cases proceeded to a hearing. And in footnote 29 on p. 23 of its brief, the Board stated:

> "During the first twenty months of the amended Act, the Board had time to adjudicate a total of only 288 contested unfair labor practice cases. *Source:* N. L. R. B. Administrative Statistics Branch. Accordingly, if during this period the Board were required to hear and determine the disputes underlying all 117 of the 8(b)(4)(D) charges which were filed, its performance in other unfair labor practice cases would have been reduced by about 40%. Cf. N. L. R. B., *Thirteenth Annual Report* (Gov't. Print. Off., 1949), p. 108."

The above statistics, furnished by the Board, indicate that the refusals to proceed to hearing in all but 4 of the 8(b)(4)(D) charges under Section 10(k) of the Act were based upon expediency rather than upon the actual lack of a *prima facie* case, as disclosed by the Board's *ex parte* preliminary investigation, the conclusions of which are based upon considerations never made known to the petitioner.

Statutory rights are thus "whittled away" by an "erroneous statutory construction [which] lies hidden in vague findings" (Mr. Justice Douglas, speaking for the Court in *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942)).

The Court of Appeals placed great stress on the right and power of the Board to conduct investigations. Petitioner herein in no way contests the right and power of the Board to conduct investigations, but asserts that the Board cannot rely upon the results of such investigations to escape the duty mandatorily fixed upon it by Section 10(k) nor to deny petitioner the right to a hearing and

determination that such Section accords to him. The wrong to petitioner is especially aggravated where the considerations upon which the Board acted in its *ex parte* preliminary investigation have never been disclosed to petitioner.

The construction placed upon Section 10(k) by the Court of Appeals reduces its mandatory content to nothing more than an exercise of discretion by the Board. It raises the question of whether the direction to the Board to "hear and determine" the jurisdictional dispute is to have "legal effect." See *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938), where Hughes, C. J., speaking for the Court, said:

> "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to *'determine'*. The Commission must determine *'after hearing.'* The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect."

The Court of Appeals' construction placed upon Section 10(k) of the Act overlooks the introductory words of Section 10(k). These introductory words provide:

> "Whenever it is *charged* that any person has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen * * *." (Emphasis supplied.)

The Court of Appeals' construction of the Section transforms "whenever it is *charged*" to "whenever it is *found*" —a drastic overhauling of a statute by judicial interpretation.

The Court of Appeals emphasizes the importance of the preliminary investigatory power of the Board by pointing out that, without it, the Board would have to conduct a hearing and render a determination even if (a) jurisdictional requirements would be lacking or (b) the complaining labor organization has not filed the necessary financial reports and non-Communist affidavits (R. 30, 31). These considerations are inapplicable to the case at bar, because (a) neither the jurisdictional nor filing requirements are at issue here, were not raised by the pleadings and actually are met, and (b) an investigation for *procedural* purposes to determine whether jurisdictional facts exist upon which to base invoking the Act or whether petitioner is *persona non grata* for failure to meet the Act's filing requirements cannot be extended to give the Board discretionary powers to deny petitioner's *substantive* right to a hearing under Section 10(k) which commands the Board to accord petitioner such hearing.

The Court of Appeals has permitted the Board to ignore the command of Section 10(k) by attempting to work out an adjustment of the mandatory language of Section 10(k) with other powers granted to the Board under various other sections of the Act (R. 28-29). This violates principles laid down by this Court in *Colgate-Palmolive-Peet Co.* v. *NLRB*,

338 U. S. 355 (1949), where the Board watered down Section 8(3) of the Act by its *Rutland Court* doctrine. By resorting to the same practice in the case at bar, the Board has exceeded its lawfully delegated authority.

> "* * * we must expect judicial review to continue its historic function as a brake on excursion by the administrative body beyond its lawfully delegated authority * * *." Final Report of the Attorney-General's Committee on Administrative Procedure, U. S. Government Printing Office, 1941, p. 77.

In addition to the above considerations, the case at bar involves a decision of the United States Court of Appeals for the District of Columbia Circuit on a question of substance relating to the construction and application of a statute of the United States which has not, but should, be settled by this Court.

Conclusion.

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 799

CHARLES H. PARSONS, INDIVIDUALLY AND AS PRESIDENT OF THE UNITED TELEPHONE ORGANIZATIONS, ETC., PETITIONER

v.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., ABE MURDOCK, AND J. COPELAND GRAY, INDIVIDUALLY AND AS MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD AND ROBERT N. DENHAM, INDIVIDUALLY AND AS GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals, not yet officially reported, appears at pp. 23–32 of the record. The opinion of the District Court, likewise not officially reported, appears at pp. 16–18 of the record.

JURISDICTION

The judgment of the Court of Appeals (R. 33) was entered on February 20, 1950. The petition for a writ of certiorari was filed on May 4, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioner, having filed charges alleging that unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act were being committed incident to certain jurisdictional disputes, the General Counsel of the Board conducted a preliminary administrative investigation which revealed that the charges were unsupported by sufficient evidence to warrant further proceedings. The question presented is whether, in these circumstances, the Board was required by Section 10 (k) of the Act to hear and determine the jurisdictional disputes, although they had given rise to no unfair labor practices.[1]

[1] In essence, the petition for certiorari is limited to this single question (Pet., p. 2). Petitioner's supporting brief specifies, however, that the Court of Appeals not only decided this question erroneously, but also erred in holding that the District Court was without jurisdiction of the subject matter, and that the complaint failed to state a cause of action (Br., pp. 2–3). Since, as petitioner concedes (Br., p. 3), "the latter two specifications of error arise out of the first specification of error" because the conclusions of the Court of Appeals thereon followed "solely as a result of its construction of Section 10 (k) of the Act (R. 24, 32)," we shall not treat these subsidiary questions in the body of our brief. See n. 6, p. 13, *infra*.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix *infra*, pp. 15–21.

STATEMENT

On January 31, 1949, petitioner filed a complaint in the District Court against the individual members of the National Labor Relations Board and its General Counsel (R. 1–7). The principal allegations of the complaint may be summarized as follows:

1. On or about September 2, 1947, the United Telephone Organizations (hereinafter called "UTO"), by petitioner, its president, filed a charge with the Regional Director of the Board for the Second Region, reciting that it was filed "pursuant to Section 10 (k)" of the Act, and alleging that Local 3 of the International Brotherhood of Electrical Workers, A. F. of L. (hereinafter called "Local 3") was engaging in unfair labor practices within the meaning of Section 8 (b) (4) (D) of the Act (R. 2–3, 8–9). The charge specified that Local 3 was engaging in a concerted refusal "to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services in connection with conduit and telephone installations at the Idlewild Airport" in New York City, an object thereof

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being to force "the New York Telephone Company to assign particular work to * * * members of Local 3" rather than to employees of the Company, who were members of UTO. The charge further set forth that Local 3 threatened to have all of the A. F. of L. building trades unions "withdraw all of their members from work at the Idlewild Airport * * * if such conduit or telephone installations were erected" by UTO. (*Ibid.*)

2. On or about September 18, 1947, UTO filed a second charge with the Regional Director, alleging identical conduct by Local 3 in connection with construction work at various housing projects in New York City (R. 3–4, 10–11).

3. On August 18, 1948, the Regional Director advised UTO that the above charges had been "carefully investigated and considered," and that, as "a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time." Accordingly, the Regional Director refused to notice for hearing the jurisdictional disputes underlying the alleged unfair labor practices (R. 4, 12).

4. UTO thereupon appealed the Regional Director's ruling to the General Counsel of the Board, who likewise concluded that "there is insufficient evidence to warrant further proceedings" (R. 4, 13).

5. The General Counsel's decision was then appealed to the Board, which denied the appeal on the grounds that (a) the Board "is without authority to review actions of the General Counsel in refusing to issue complaints"; (b) the Board "is of the opinion that a hearing under the provisions of Section 10 (k) of the Act is not mandatory and that the Regional Director upon completion of investigation properly refused to issue a notice of hearing" (R. 4–5, 14).

The gravamen of the complaint was that, because Section 10 (k) of the Act required the Board, whenever a charge was filed alleging a violation of Section 8 (b) (4) (D), to hear and determine the dispute out of which the violation shall have arisen, it followed that the Board, in making this formal step contingent upon the outcome of an investigation into the *prima facie* merit of the charge, failed to perform the mandatory duty imposed by Section 10 (k); and that this action was causing UTO "irreparable damage" for it deprived UTO of the "right to a hearing" guaranteed by Section 10 (k) (R. 5–6). The complaint prayed that the individual members of the Board be compelled to hear and determine the jurisdictional disputes in question (R. 6–7).

On March 31, 1949, the Board filed a motion to dismiss the complaint, on the grounds that (a) the District Court was without jurisdiction of the

subject matter of the action; and (b) the complaint failed to state a claim upon which equitable relief could be granted (R. 15). On June 16, 1949, the District Court, after oral argument, entered an order denying the Board's motion to dismiss (R. 16). The court rendered an oral opinion supporting its order (R. 16–18), in which it construed Section 10 (k) "to require the National Labor Relations Board to afford a hearing to persons making charges of this kind" (R. 18).

On June 27, 1949, the Board filed a statement of election not to plead further in the cause, and requested that the District Court, upon entry of final order, also "enter an order staying execution of the same pending appeal" (R. 18). On July 14, 1949, the District Court entered an order directing the Board to hear and determine the jurisdictional disputes "arising out of the charges" filed by UTO, and at the same time stayed execution of its judgment pending appeal by the Board (R. 19–20).

On February 20, 1950, the Court of Appeals unanimously reversed the decision of the District Court, and remanded the case to that Court with instructions to dismiss "for lack of jurisdiction over the subject matter and for failure of the complaint to state a cause of action" (R. 33). In its opinion (R. 23–32), the court, after detailed analysis of the purpose of Section 10 (k) and the relation between it and other provisions of the Act, concluded, *inter alia,* that this pro-

vision did not insulate 8 (b) (4) (D) charges from the preliminary screening procedure applicable in respect to all other unfair labor practice charges. Accordingly, the Board's duty under Section 10 (k) to hear and determine jurisdictional disputes became operative, not upon the mere filing of an 8 (b) (4) (D) charge, but only after preliminary investigation of the charge disclosed reasonable cause to believe that it was true.

ARGUMENT

Petitioner's contention that the Board is required by Section 10 (k) of the Act to hear and determine a jurisdictional dispute, despite the absence of even *prima facie* evidence that such dispute has resulted in an unfair labor practice under Section 8 (b) (4) (D) of the Act, presents no substantial question warranting review by this Court.

1. Petitioner's argument rests upon the fallacious assumption that the Board is authorized by Section 10 (k) to hear and determine jurisdictional disputes, as such, without regard to whether those disputes have given rise to the strikes or boycotts proscribed by Section 8 (b) (4) (D). The assumption is refuted by the express language of Section 10 (k) which empowers the Board to determine only those disputes out of which unfair labor practices "shall have arisen".

The assumption is also inconsistent with the fact that, as petitioner concedes (Br., p. 16),

Section 10 (k) is merely an ancillary remedy for violations of Section 8 (b) (4) (D). That subsection is part of Section 10, entitled "Prevention of Unfair Labor Practices." The function of Section 10 (k) is to provide a method for remedying the unfair labor practices by resolving the underlying dispute (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 8, 27). To invoke the Board's jurisdiction under that subsection a charge must be filed alleging that a violation of Section 8 (b) (4) (D) has been committed. If the procedures under 10 (k) are unsuccessful in eliminating the unfair labor practice, the same charge serves as the basis for further proceedings, *i. e.*, the issuance of a complaint under Section 10 (b), and the issuance of a preliminary injunction under Section 10 (l). Indeed, while the procedures under Section 10 (k) are pending, the Board may apply for temporary injunctive relief against the unfair labor practice under Section 10 (l). Thus, as the court below stated (R. 26): "The existence of an unfair labor practice within the meaning of Section 8 (b) (4) (D), is a *sine qua non* to the Board's power to hear and determine [jurisdictional disputes]."

Petitioner's contrary construction of Section 10 (k) rests upon abstraction of the words "Whenever it is charged, * * * the Board is * * * directed to hear and determine" from the remainder of the Section and from the statute as a whole. As the court below pointed

out, to adopt petitioner's construction would necessitate (R. 26) "rewriting that section to read 'the Board is empowered and directed to hear and determine the dispute out of which the *charge* shall have arisen'."[2] That construction would result in requiring the Board to hear and determine jurisdictional disputes even though the dispute arose in an industry outside the Board's jurisdiction, and even though the labor organization named in the charge had engaged in no strike or boycott whatever, or in a strike or boycott which was not an unfair labor practice because the union possessed a Board certification.[3] Moreover, petitioner's construction would result in compelling the Board to decide jurisdictional disputes in cases where, as in the instant case, its determination could not be vindicated by the supplementary complaint and injunction remedies of Sections 10 (b) and (l).

[2] Indeed, petitioner's complaint was premised upon the theory that it is the filing of the charge which creates the dispute (see R. 4–5, pars. 12, 18, 19). The relief sought was that the Board "be required to hear and determine the disputes arising out of the * * * charges * * * filed by the plaintiff * * *" (R. 6). This was the theory apparently adopted by the District Court, which, in the judgment reversed by the court below, directed the Board "to hear and determine the dispute arising out of the unfair labor practice charges filed by the [petitioner]" (R. 19).

[3] Section 8 (b) (4) (D) specifically *permits* strikes and boycotts in furtherance of a jurisdictional dispute, where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Having made the determination, the Board would have no alternative but to dismiss the charge, despite the express provision of Section 10 (k) that dismissal shall occur "upon compliance by the parties * * * with the decision of the Board." As the court below observed (R. 29), "We cannot subscribe to a construction of the statute which would lead to such irrational results."

2. Petitioner's contention that the Board is not empowered to conduct a preliminary investigation into charges alleging violations of Section 8 (b) (4) (D) before conducting a hearing and making a determination of the underlying jurisdictional dispute rests entirely upon the absence of a provision in Section 10 (k) authorizing such investigation. But the power to conduct preliminary investigations of *all* charges filed pursuant to Section 10 is clearly conferred by Sections 3 (d) and 10 (b). Petitioner, indeed, concedes that these powers are applicable to charges of violation of Section 8 (b) (4) (D) as well as to all other charges. Petitioner argues only that although an investigation of the charges may, and indeed must, be conducted for the purpose of determining whether a complaint should issue under Section 10 (b) or an injunction should be sought under Section 10 (l), the investigation can have no bearing upon whether the charges warrant proceeding under Section 10 (k). This argument rests upon the same fal-

lacious assumption, discussed above, that Section 10 (k) creates an independent procedure, entirely unrelated to the prevention of unfair labor practices.

Moreover, since, as the court below pointed out (R. 26), "A mere charge of an 8 (b) (4) (D) violation does not operate to give verity to the existence of such an unfair labor practice", to preclude the Board from conducting an investigation for the purpose of determining whether to proceed to a 10 (k) hearing would in effect remove the statutory limitation which restricts the Board to determination of those jurisdictional disputes which have given rise to unfair labor practices. As the court below held, to give effect to this limitation (R. 26), "before the Board may proceed to a hearing it must determine whether in fact the dispute does give rise to the 8 (b) (4) (D) violation, and, in order to make this determination, it must conduct a preliminary investigation. This is the only rational construction that can be made of the language of Section 10 (k) itself."

3. Petitioner's contention that by permitting the Board to refuse to hear and determine a jurisdiction dispute where preliminary investigation discloses no *prima facie* evidence of a violation of Section 8 (b) (4) (D), the court below, in effect, has substituted for the words "Whenever it is charged", the words "Whenever it is found", is entirely without substance. The

Board's preliminary investigation does not result in a "finding" that a violation of Section 8 (b) (4) (D) has been committed. It is undertaken only to determine whether there is reasonable cause so to believe; this is the very determination which must be made before any of the other remedies for violation of Section 8 (b) (4) (D) (Sections 10 (b) and 10 (l) may be invoked. Only if the 10 (k) remedy does not terminate the unfair labor practice does the Board conduct a hearing and determine whether the violation of 8 (b) (4) (D) alleged has actually been committed.[4]

4. Equally insubstantial is petitioner's contention that the holding of the court below in effect nullifies the mandatory character of the language of Section 10 (k), which not only empowers but "directs" the Board to hear and determine jurisdictional disputes which come within that

[4] The excerpt from the Board's decision in *Moore Drydock Co.*, 81 NLRB 1108, quoted by petitioner (Br., p. 10), is plainly consistent with the foregoing. The Board's statement that "the word 'charged' is suggestive of an allegation rather than a finding or determination" was made in answer to the union's contention that, "in the absence of a prior unfair labor practice *finding* the Board is unable to proceed under Section 10 (k)." As such, it means only that a formal finding by the Board, pursuant to the "full dress" procedure specified in Sections 10 (b) and (c), is not required before 10 (k) becomes operative. It has no bearing whatever on the further question of whether, assuming a finding is unnecessary, a *prima facie* case in support of the charge must nevertheless be shown. See also, *Ship Scaling Contractors Assn.*, 87 NLRB, No. 14, 25 LRRM 1086, 1088 (November 18, 1949).

Section. As the court below pointed out (R. 30): "the mandate [becomes operative] when a *prima facie* case is established though not until then. Congress could not have intended otherwise."[5]

5. Between August 22, 1947, and February 28, 1950, 173 charges alleging violation of Section 8 (b) (4) (D) were filed with the Board. Of these, 131 were disposed of without formal hearing under Section 10 (k). Of the parties involved, petitioner alone has challenged in the courts the Board's power to protect its processes from abuse by conducting preliminary investigations before proceeding to a Section 10 (k) hearing.

Indeed, this action was instituted in the District Court only after the Joint Congressional Committee created by the Labor Management Relations Act heard and evidently rejected petitioner's complaint that in so proceeding the Board was exceeding its powers under the Act. (See R. 31–32.)

CONCLUSION

The decision below is clearly correct[6] and presents no substantial question warranting re-

[5] The Board has construed the language of Section 10 (k) as requiring it to hold a 10 (k) hearing whenever preliminary investigation reveals that a charge of Section 8 (b) (4) (D) violation has *prima facie* support. See *Moore Drydock Co.*, 81 NLRB 1108; *Juneau Spruce Corp.*, 82 NLRB 650; *Ship Scaling Contractors Assn.*, 87 NLRB No. 14.

[6] Since the Board's interpretation of Section 10 (k) was upheld, it follows that the complaint in the District Court

view. No conflict of decisions is shown; indeed, the contentions here advanced by petitioner have not even been urged in any other case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1950.

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failed to state a cause of action. The conclusion that the District Court was also without jurisdiction of the subject matter of the action follows from the fact that, assuming the Board's interpretation of Section 10 (k) to be valid, the case reduces itself to an attempt to obtain review of a determination made by the General Counsel and his agents in the course of a preliminary investigation under Sections 3 (d) and 10 (b). It is well settled that such determination is a matter of administrative discretion, unreviewable by the courts. *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (C. A. 1); *General Drivers, Etc.* v. *National Labor Relations Board*, 179 F. 2d 492 (C. A. 10); cf. *Ewing* v. *Mytinger & Casselberry, Inc.*, No. 568, Oct. Term, 1949, decided May 29, 1950.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C., Supp. II, Secs. 141 *et seq.*) are as follows:

TITLE I — AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"NATIONAL LABOR RELATIONS BOARD

"SEC. 3. * * *

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor

practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other

person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in ques-

tion is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any

district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and

make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D)."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. [redacted] 57

CHARLES H. PARSONS, Individually and as President of the UNITED TELEPHONE ORGANIZATIONS, etc.,
Petitioner,

vs.

PAUL M. HERZOG, JOHN M. HOUSTON, JAMES J. REYNOLDS, JR., *et al.*, etc.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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The Opinion Below.

The Opinion of the Court of Appeals has not yet been officially reported. It appears at pp. 23-32 of the Transcript of Record.

The Opinion of the United States District Court for the District of Columbia has not been officially reported. It appears at pp. 16-18 of the Transcript of Record.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

This case involves a decision of the United States Court of Appeals for the District of Columbia on a question of substance relating to the construction and application of a statute of the United States, namely Section 10(k) of the

Labor Management Relations Act of 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C. Supp. I, Secs. 141 *et seq.*)

Statutes Involved.

The pertinent sections of the National Labor Relations Act (61 Stat. 136, 29 U. S. C. Supp. I, Secs. 141 *et seq.*) are set forth in the Appendix to this Brief. Section 10(k) of the National Labor Relations Act has also been quoted on pp. 2-3 of the Petition for Writ of Certiorari.

The pertinent sections of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Secs. 1001 *et seq.*) are set forth in the Appendix to this Brief.

Statement.

On pp. 3-6 of the Petition for Writ of Certiorari, which this Brief supports, appears a complete and detailed statement of all the facts which are material to the consideration of the questions presented in this case. It is, therefore, unnecessary to repeat that statement here.

Specification of Errors.

The Court of Appeals erred:

1. In holding that the National Labor Relations Board may refuse, as a result of its own *ex parte* investigation, to heed the mandate of Section 10(k) of the Act to hear and determine the jurisdictional dispute when petitioner charged that an unfair labor practice had been committed within the meaning of section 8(b) (4) (D) of the Act.

2. In holding that the United States District Court for the District of Columbia lacked jurisdiction over the subject matter of petitioner's complaint that the Board did not

accord petitioner a hearing and determination under Section 10(k) of the Act.

3. In holding that petitioner's complaint failed to state a cause of action.

The latter two specifications of error arise out of the first specification of error because the Court of Appeals ruled (a) that the District Court had no jurisdiction over the subject matter and (b) that the petitioner's complaint failed to state a cause of action solely as a result of its construction of Section 10(k) of the Act (R. 24, 32).

I.

It was error for the Court of Appeals to hold that the Board may refuse, as a result of its own *ex parte* investigation, to heed the mandate of Section 10(k) of the Act to hear and determine the jurisdictional dispute when petitioner filed the unfair labor practice charge within the meaning of Section 8(b) (4) (D) of the Act.

The entire crux of this case revolves about an interpretation of Section 10(k) of the Act. It provides:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

When petitioner filed the unfair labor practice charges within the meaning of Section 8(b) (4) (D) of the Act (more commonly known as the jurisdictional dispute),[1] the Regional Director of the Board's Second Region, after permitting the charges to lie dormant for almost a year, notified petitioner that he would refuse "to issue Complaint", because, as a result of an investigation, "there does not appear that there is sufficient evidence of violations to warrant further proceedings at this time" (R. 12).

This very first step in the proceedings of the Board's agent was an erroneous application of Section 10(k) of the Act. That Section calls for holding a hearing and rendering a determination and not for the issuance of complaints. This is clear, especially, from the last sentence of Section 10(k) which provides that the *"charge"* shall be dismissed, if, after a hearing and determination, the parties comply with the Board's determination or voluntarily adjust the dispute.

Furthermore, in addition to his erroneous application of Section 10(k) of the Act, the Board's agent never divulged the considerations (if any) that impelled him, as a result of his "investigation," to refuse "to issue Complaint."

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[1] Section 8(b)(4)(D) of the Act provides as follows:

"It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * * forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work * * *"

The appeal to the General Counsel was unproductive of results (R. 13) and petitioner appealed to the Board (R. 4). The Board refused to alter the positions taken by the Regional Director and the General Counsel and gave two grounds for its action: (1) that the Board has no authority to review the refusal of the General Counsel "to issue complaints", and (2) that "*Section 10(k) of the Act is not mandatory* and that the Regional Director upon completion of investigation properly refused to issue a notice of hearing" (R. 14). (Emphasis supplied.)

Thus, the position of the Board (in the initial stages of these proceedings) was that "Section 10(k) is not mandatory." Furthermore, the Board sustained the Regional Director "in refusing to issue a notice of hearing" when, actually, the Regional Director never concerned himself with issuing a "notice of hearing" but was concerned solely (and erroneously) with the refusal "to issue Complaint" (R. 12).

It is apparent, from the foregoing, that the paramount reason for the Board's refusal to hold the hearing and render its determination, in this case, was that the Board believed Section 10(k) is "not mandatory" (R. 14), rather than an *ex parte* investigation's disclosures prompted its inaction.[2]

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[2] That expediency (rather than an *ex parte* investigation's disclosures) also played a part in the Board's refusal to hear and determine the jurisdictional disputes is apparent from the following (quoted from footnote 29 on page 23 of the Board's brief submitted to the Court of Appeals in this case):

> "During the first twenty months of the amended Act, the Board had time to adjudicate a total of only 288 contested unfair labor practice cases. *Source:* N. L. R. B. Administrative Statistics Branch. Accordingly, if during this period the Board were required to hear and determine the disputes underlying all 117 of the 8(b)(4)(D) charges which were filed, its performance in other unfair labor practice cases would have been reduced by about 40%. Cf. N. L. R. B., *Thirteenth Annual Report* (Gov't Print. Off., 1949), p. 108."

Despite its initial position that it believed Section 10(k) was not mandatory, the Board, in its presentation before the Court of Appeals, veered to the position that the Section was mandatory but that its preliminary *ex parte* investigation established sufficient basis for its refusal to heed the mandate. Thus, the Court of Appeals said (R. 25):

> "Neither the appellant nor the appellee deny that the words 'empowered and directed' act as a mandate to the Board to hear and determine disputes out of which 8(b)(4)(D) violations have arisen."

But nowhere, at any stage of these proceedings, either administrative or judicial, did the Board reveal any factual or rational considerations disclosed by its preliminary investigation which prompted it to refuse to follow the mandate of Section 10(k).

The foregoing is adverted to in detail because the Court of Appeals permitted the Board to escape the mandate of Section 10(k) through the medium of a preliminary investigation (R. 26, 29, 30, 31). It is respectfully submitted that before any preliminary investigation is permitted to fritter away the mandate of Section 10(k), such investigation should at least attain the dignity of something more than an after-thought, especially where, as here, the after-thought is non-revealing of any considerations whatsoever that led the Board to deny to petitioner an important right to a hearing. The factual situation, presented by the pleadings, is redolent with administrative misconception of duties imposed by statute. It is submitted, therefore, that a belated reliance upon an investigation, the contents of which have never been disclosed either to the petitioner or the Court, should not be permitted to dissipate statutory rights. See *U. S.* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942), where this Court said:

> "If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away."

It is further submitted that Section 10(k) does not contemplate having its mandate side-stepped by a preliminary *ex parte* investigation, assuming that the actual basis for dodging the mandate *was* rooted in an investigation instead of a misconception of duties arising under the statute.

The *ratio decidendi* of the Court of Appeals, in rendering its holding was:

1. The Board has the right to conduct investigations, and this right exists, not only independently in Section 10(k), but also generally (R. 26);

2. The Board, under Section 10(k), has the duty to hear and determine *only* such disputes which disclose the existence of an 8(b)(4)(D) violation (R. 26);

3. Therefore, the Board has the right to investigate to determine whether a *prima facie* existence of a violation of Section 8(b)(4)(D) exists; and only if this investigation discloses such violation, need the Board comply with the mandate of Section 10(k) (R. 30).

Petitioner has no quarrel with the proposition that the Board, under the Act, has the *general* power to conduct investigations. Thus, the Board has judicially unreviewable discretion to issue or refuse to issue a Complaint under Section 10(b) of the Act,[3] and, in order to exercise this discretion with something other than whim or caprice, the Board obviously must base such discretion upon the results of an investigation. Also, under Section 10(l) of the Act, the Board is specifically given the right to investi-

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[3] *Jacobsen* v. *N. L. R. B.*, 120 F. (2d) 96, 100 (C. A. 3); *N. L. R. B.* v. *The Barrett Co.*, 120 F. (2d) 583, 586 (C. A. 7); *Lincourt* v. *N. L. R. B.*, 170 F. (2d) 306 (C. A. 1).

gate charges to determine whether a sufficient basis for the truth of such charges exists in order to obtain an injunction until the Board ultimately decides the case. This is necessary because the Board must be able to present to a Court evidence of the existence of unlawful acts before the Court will issue an injunction. No Court would issue an injunction on anything less.

But, merely because the Board has investigatory powers for (1) the proper exercise of discretion under Section 10(b) and (2) for the purpose of presenting a proper case for an injunction under Section 10(l), it does not follow that the Board may employ such investigatory powers for the purpose of evading the command of Section 10(k).

It is submitted that, in permitting the Board, through the medium of a preliminary investigation, to shirk its duties under Section 10(k), the Court of Appeals placed an improper construction upon that Section. This construction is improper because:

(1) it ignores the plain language of Section 10(k);

(2) it dissipates and renders ineffective the mandatory directive of Section 10(k);

(3) it changes the plain meaning of Section 10(k) by an attempted adjustment of that Section with other provisions of the Act.

The above reasons will be taken up *seriatim*.

(1)

There is no doubt that the wording "* * * the Board is empowered and directed to hear and determine the dispute * * *" in Section 10(k) is mandatory.[4]

Shields et al. v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938);

[4] The Court of Appeals, also, said neither party disputed this contention (R. 25).

State ex rel. Frohmiller v. *Hendrix et al.*, 59 Ariz. 184, 124 P. (2d) 759;
Matter of Moore Drydock Co., 81 NLRB No. 169.

When does the mandate become effective? The Court of Appeals said, only after a *prima facie* case of violation of Section 8(b)(4)(D) has been established by a preliminary investigation (R. 26, 30). But this construction changes the preliminary wording of Section 10(k) from "whenever it is *charged*" to "whenever it is *found.*"

The Board, itself, in *Matter of Moore Drydock Company, supra,* cautioned against replacing the word "charged" with "found". In that case, the employer filed an 8(b)(4)(D) unfair labor practice charge against the International Association of Machinists. The charge alleged that the IAM picketed a vessel undergoing repairs with the purpose of inducing the employer to give the work to members of the IAM instead of to members of the United Steelworkers of America, who were assigned the work by the employer. The charge was processed under Section 10(k) of the Act.

The entire five-man Board considered the case, and two members of the Board rendered various dissents. In dealing with such dissents, the majority of the Board threw much light on the construction to be placed on Section 10(k). Thus, Board Member Houston protested that the Board need not conduct a hearing at all. To this the Board majority replied:

> "This view obviously grants to the Board *discretion* to determine to what situations Section 10(k) applies in face of the mandatory import plainly implicit in the use of the term 'directed' which carries no such connotation.
>
> We have examined the reference to legislative history cited by our colleague but find no such clear

> expression therein that would, in our opinion, grant the Board the authority to override the unequivocal language of the statutory provision."

Another dissenter, Board Member Murdock, said "* * * the charge referred to must be one that has at least *prima facie* merit." The Board answered this contention in footnote 3 of *Moore Drydock* case, *supra:*

> "Although the I. A. M. contended, at the hearing and in its brief, that in the absence of a prior unfair labor practice finding the Board is unable to proceed under Section 10(k), it withdrew this contention during oral argument. In any event, we find no merit in it. *Section 10(k) uses the language 'whenever it is charged' rather than 'whenever it is found'* or a similar reference to a person who 'has engaged in an unfair labor practice within the meaning of paragraph 4(D) of Section 8(b).' *The word 'charged' is suggestive of an allegation rather than a finding or determination.* We conclude that that is all that is required before the Board may proceed to determine the dispute under Section 10(k)." (Emphasis supplied.)

By permitting the Board, in the case at bar, to escape the duties imposed upon it by Section 10(k) through the use of a preliminary investigation to determine the *prima facie* existence of an 8(b) (4) (D) violation, the Court of Appeals transformed the necessity for an *allegation* to the necessity for a *determination* or *finding* before the mandate of Section 10(k) becomes operative. By thus interpreting "whenever it is *charged*" to mean "whenever it is *found*" or "*determined*", the Court of Appeals does violence to the wording of Section 10(k).

Further examination into the wording of Section 10(k) discloses the error in construction indulged in by the Court

of Appeals. Thus, the mandate to hear and determine the jurisdictional dispute is lifted only if "within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute."

Section 10(k) does not permit the mandate to be lifted if the Board indulges merely in a preliminary investigation. It permits the mandate to be lifted only upon the meeting of the statutory requirements by the parties to the dispute. The Court of Appeals has actually written into Section 10(k) a new standard for avoiding the mandate imposed upon the Board. Thus, as construed by the Court of Appeals, the Board need not "hear and determine" the jurisdictional dispute if (a) the parties voluntarily adjust the dispute within 10 days after notice of filing of the charge, or (b) if the Board decides, as a result of its own preliminary investigation, that there is no *prima facie* existence of 8(b) (4) (D) violations. This is statutory emendation, entirely improper in view of the clear language of Section 10(k). "A judge must not re-write a statute, neither to enlarge nor to contract it." Frankfurter, "Some Reflections On The Reading Of Statutes," 47 Columbia Law Review, 527, 537.

Administrative expediency, while perhaps cogent in judicial interpretation of unclear and ambiguous language, is ordinarily not a judicially acceptable basis for writing into a statute something that is not there.[5]

It is submitted, therefore, that the construction of Section 10(k) by the Court of Appeals does violence to the language of that section.

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[5] *Anderson* v. *Wilson*, 289 U. S. 20, 27; *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

(2)

The Court of Appeals has dissipated and rendered ineffective the mandate of Section 10(k) by permitting the Board to shirk the command therein through the medium of a preliminary investigation.

It was noted above (p. 7 and footnote 3), that the Board has the judicially unreviewable discretion under Section 10(b) of the Act to issue or refuse to issue Complaints. It exercises that discretion through the medium of a preliminary investigation rather than upon mere whim or caprice. Under Section 10(b) of the Act as distinguished from 10(k) of the Act, when the Board's Regional Director refuses to issue a complaint after an unfair labor practice charge is filed, he notifies the charging party (as he did in this case) (R. 12):

> "As a result of the investigation, it does not appear that there is sufficient evidence of violations to warrant further proceedings at this time and I am, therefore, refusing to issue Complaint in this matter."

The Board's discretionary power to issue or to refuse to issue complaints under Section 10(b) stems from the permissive language of that section, which states, in part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, *shall have power* to issue * * * a complaint. * * *"

The wording "shall have power" was held to vest discretionary power in the Board and, consequently, the Board could refuse to issue a complaint.[6] But, the wording

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[6] *Jacobsen* v. *NLRB*, 120 F. (2d) 96 (C. A. 3); *Lincourt* v. *NLRB*, 170 F. (2d) 306 (C. A. 1).

"is empowered and *directed,*" appearing in Section 10(k) is mandatory.

If the Board is permitted to side-step the mandate of Section 10(k) in the very same manner and through the very same use of the preliminary investigation which it employs to exercise its discretion under Section 10(b), then the mandatory language of Section 10(k) has thus been equated with the discretionary and permissive language of Section 10(b).[7] In this way, the mandatory language of Section 10(k) is frittered away and completely emasculated. The right to a hearing under Section 10(k) thus becomes a "ghost, seen in the law, but elusive to the grasp."

This Court, in *Shields et al.* v. *Utah, Idaho Central Ry. Co.*, 305 U. S. 177, 182 (1938), interpreting a statutory directive for a hearing and determination which appeared in the Railway Labor Act (48 Stat. 1185; 45 U. S. C. 151) said:

> "In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to '*determine.*' The Commission must determine '*after hearing.*' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts.' The 'hearing' is 'the hearing of evidence and argument.' *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *In-*

[7] The use of permissive language in one section of a statute and mandatory language in another, indicates, by the very distinction thus made, that Congress intended the mandatory language to have legal effect. *U. S. ex rel. Siegel* v. *Thoman*, 156 U. S. 353; *Federal Land Bank of Illinois* v. *Hansen*, 113 F. (2d) 82 (C. A. 2); 3 Sutherland, Statutory Construction, p. 116.

> *terstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect."

Administrative agencies, which fail to follow the mandate in the statutes which create them and endow them with whatever powers they have, are judicially corrected.[8] What this Court said, in *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178, is of pertinent bearing upon the case at bar (See 252 U. S. 178 at 187-188):

> "* * * we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the non-action of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission, to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.
>
> It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination' and called for 'inadmissible assumptions' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment' and that these

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[8] *Interstate Commerce Commission* v. *Humboldt S. S. Co.*, 224 U. S. 474; *Kansas City Southern Ry. Co.* v. *I. C. C.*, 252 U. S. 178; *Addison* v. *Holly Hill Fruit Products Co., Inc.*, 322 U. S. 607, 622; *Morgan* v. *U. S.*, 298 U. S. 468.

conclusions were the necessary consequence of the *Minnesota Rate Cases*, 230 U. S. 352.

We are of opinion, however, that considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwitting assumption by the Commission of authority which it did not possess."

Petitioner submits that the construction of Section 10(k) by the Court of Appeals destroys completely the mandatory effect of that section.

(3)

In support of its holding, in the case at bar, the Court of Appeals adverted to the role of Section 10(k) in the entire statutory scheme of the duty and power of the Board to deal with unfair labor practices. The Court pointed to the power of the Board to issue complaints under Section 10(b) of the Act and to apply for injunctions under Section 10(1) of the Act (R. 28), and that, in both instances, the Board uses its investigatory powers to determine whether it should proceed under such sections. Inasmuch as an 8(b)(4)(D) charge might ultimately be the subject of a complaint to be issued under Section 10(b), the Board (said the Court) has the power to investigate such charge to determine whether or not to issue a complaint. And the Board may, therefore, use the results of this same investigation to determine whether or not to proceed to a hearing under Section 10(k) (R. 28, 29).

Not only does this attempted adjustment of Section 10(k) with other sections of the Act deprive Section 10(k)

of its mandatory effect and do violence to its language, but it also, rationally speaking, puts the cart before the horse. The 8(b)(4)(D) charge proceeds to hearing under Section 10(k), but becomes the subject of a complaint under Section 10(b) *only after* the Board has rendered its determination (in accordance with Section 10(k)), and *only after* one of the parties to the dispute refuses to abide by the Board's determination.[9] Therefore, the investigation necessary to determine whether or not to issue a complaint under Section 10(b) should not be used to determine whether to proceed to a hearing and determination under Section 10(k), where the 10(k) procedure is to take place *before* the 10(b) procedure, and where the mandatory language of Section 10(k) orders the Board to "hear and determine" the disputes.

The attempted adjustment of Section 10(k) with the other (and more discretionary) powers vested in the Board under other subsections of Section 10 of the Act was predicated by the Board upon its *Rutland Court*[10] doctrine. This is apparent from the Board's brief submitted to the Court of Appeals, in the case at bar, on p. 9, footnote 5. There, the Board said:

> "Thus, it was a consideration of the specific provision in relation to the policy and structure of the statute as a whole that led to the *Rutland Court* rule * * *."

The Board's practice of whittling down the effect of one section of the statute by attempting for the sake of administrative expediency, to adjust that section of the statute

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[9] Section 203.77 of the Board's *Rules and Regulations (Series 5)*, (12 F. R. 5656, 13 F. R. 4872).

[10] *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587; 46 N. L. R. B. 1040.

with another section was discouraged and set aside as an illegal assumption of power by this Court in *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355 (1949).

In view of the foregoing, it is respectfully submitted that the Court of Appeals erred in its construction of Section 10(k) of the National Labor Relations Act.

II.

The Court of Appeals erred in holding that the United States District Court lacked jurisdiction of the subject matter.

The Court of Appeals ruled that, inasmuch as it construed Section 10(k) as not commanding the Board to hold a hearing in the case at bar, it followed that the District Court lacked jurisdiction of the subject matter (R. 24, 32).

Petitioner has argued (in Point I, *supra*) for his contention that the Court of Appeals erred in its construction of Section 10(k). However, should petitioner be upheld in his contention, the question of jurisdiction of the District Court still arises, especially since the Board vigorously raised the question in the lower courts.

The District Court had jurisdiction of the subject matter (a) under its general equity jurisdiction (Section 24(8) of the Judicial Code, 28 U. S. C. Section 1337) and (b) under the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A. Section 1001 *et seq.*).

If the District Court had refused to take jurisdiction of this matter no remedy would exist to enforce the statutory command Congress wrote into Section 10(k). A Court may not review discretionary exercise of power when a statute expressly grants such discretion to the agency exercising it. But, where, as here, a statute specifically *com-*

mands an agency to act and specifically removes discretion on the part of the agency to refuse to act, how else but through its equity powers can a Court force that agency to abide by the statutory command?

In this respect, the dictum of Mr. Justice Douglas in *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297, 300, is pertinent. He said:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in *Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548 and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515. In those cases it was apparent that *but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands* which Congress had written into the Railway Labor Act." (Italics supplied.)

See also:

> *Stark* v. *Wickard*, 321 U. S. 288;
> *Work* v. *Rives*, 267 U. S. 175;
> *Louisiana* v. *McAdoo*, 234 U. S. 627;
> *Marbury* v. *Madison*, 1 Cranch. 137, 165-166;
> *American Chain & Cable Co.* v. *F. T. C.*, 142 F. (2d) 909 (C. A. 4).

In *U. S. ex rel. Chicago G. W. R. R. Co.* v. *I. C. C.*, 294 U. S. 50, the United States Supreme Court distinguished between situations where it would review administrative action and situations where it would not review such action. The dividing line was pricked out by determining whether the statute involved gave the administrative agency *discre-*

tion to act or whether it *commanded* the agency to act. Thus, on page 60 of that decision, the Court said:

> "Where judgment or discretion is reposed in an administrative agency and has by that agency been exercised, courts are powerless by the use of the writ to compel a different conclusion."

Then, on page 61, the Court added:

> "If, on the other hand, power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon its merits."

It is submitted that the instant case was reviewable by the District Court in its exercise of general equity jurisdiction because it involves a situation where a government agency is, by statute, commanded to hold a hearing and has refused to do so, and because that agency's discretionary exercise of power is not involved in the review.

This conclusion is, further, bolstered by the Administrative Procedure Act. Pertinent portions of Section 10 of that Act provide:

> "Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action * * * shall be entitled to judicial review thereof.
>
> * * * * * *
>
> (c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any Court shall be subject to judicial review.
>
> * * * * * *

> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. It shall (A) compel agency action unlawfully withheld * * *."

The case at bar does not come within either of the exceptions set forth in the first sentence of Section 10 of the Administrative Procedure Act. Consequently, the provisions of that Act operate to accord petitioner herein the relief prayed for in its "Complaint for Injunction".

An examination into the provisions of the National Labor Relations Act indicates conclusively that nothing in that Act either expressly or impliedly "precludes judicial review" in a situation such as that presented by the case at bar.

In view of the foregoing, it is respectfully submitted that the District Court had jurisdiction of the subject matter under its general equity powers and also under the Administrative Procedure Act.

III.

The Court erred in holding the complaint failed to state a cause of action.

The Court of Appeals concluded that the complaint herein failed to state a cause of action as a result of the Court's determination that the Board was not commanded, by Section 10(k), to hold a hearing in this matter.

Petitioner submits that, if this Court holds Section 10(k) required the Board to "hear and determine" the disputes giving rise to petitioner's 8(b) (4) (D) charges, the complaint states a cause of action.

Petitioner's right to a hearing is not, as the Board argued in the Court below, a "public" right, enforceable solely by the Board. If petitioner's grievance was that third persons committed unfair labor practices, of which petitioner was a victim, the right to have such unfair labor practices dealt with in accordance with the National Labor Relations Act is undoubtedly a "public" right enforceable by the Board alone.[11] But the case at bar is more properly determined by principles enunciated in *Stark* v. *Wickard,* 321 U. S. 288; *Louisiana* v. *McAdoo,* 234 U. S. 627, 633; *Work* v. *Rives,* 267 U. S. 175; *American Chain and Cable Co.* v. *F. T. C.,* 142 F. (2d) 909, (C. A. 4), namely, that where a statute gives a person a right to a hearing and requires the administrative agency involved to conduct such hearing, "such a right created by statute is mandatory in character and obviously capable of judicial enforcement" (*Stark* v. *Wickard, supra,* on p. 303).

In a Note in 38 Harvard L. R. 377, entitled "Enforcement of Duties Under the Labor Provisions of the Transportation Act", we find the following pertinent observation:

> "But where the legislature has used mandatory words, has imposed express 'duties', but has failed to provide effective remedies for their breach, the courts habitually apply these rules of interpretation to fill the gaps in the legislature's work and to give those injured by violations of the statute such remedies either at law or in equity as best carry out its purpose. For if no one may have relief for another's violation of such a statutory duty, the legislative imposition of the duty is just so much talk."

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[11] *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261, 265; *Bakery & Sales Drivers* v. *Wagshall,* 333 U. S. 437; *Amalgamated Ass'n. etc.* v. *Dixie Motor Coach Corp.,* 170 F. (2d) 902 (C. A. 8).

The situation presented by the instant case, and the allegations contained in the "Complaint for Injunction" (R. 1-14), state a cause of action to which Section 10(e) of the Administrative Procedure Act is particularly applicable to authorize a federal court to "compel agency action unlawfully withheld."

Conclusion.

It is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix.

The relevant provisions of the Labor Management Relations Act, 1947 (Act of June 23, 1947, C. 120, 61 Stat. 136, 29 U. S. C., Supp. I, Secs. 141 *et seq.*) are as follows:

Title I—Amendment of National Labor Relations Act.

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * *

"National Labor Relations Board

* * * * * *

"Unfair Labor Practices

"Sec. 8. * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

"(4) to engage, in or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is:

* * * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any

person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint; *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based

thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States

for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * *

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under sub-

section (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * * *

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further,* That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further,* That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly author-

ized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

* * * * * *

The relevant provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. A., Secs. 1001 *et seq.*) are as follows:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency

action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitu-

tional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."